Anwar et al v. Fairfield Greenwich Limited et al
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Exhibit A

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, et al. v. FAIRFIELD GREENWICH LIMITED, et al.	:	Master File No. 09 CV 0118 (VM)
	:	09 CV 2366 (VM) (Ferber Action)

PLAINTIFF'S NOTICE OF MOTION

PLEASE TAKE NOTICE that David I. Ferber SEP IRA, plaintiff in No. 09 CV 2366 (VM) (the "Action"), by its undersigned counsel, upon the accompanying memorandum of law and all prior papers had herein, hereby moves the Court for an Order:

(i) pursuant to 28 U.S.C. § 1447(c), remanding the Action to the Supreme Court of the State of New York, County of New York, and awarding plaintiff costs incurred as a result of the removal of the Action;

(ii) vacating the Court's Order dated March 24, 2009 (Dkt. No. 5, 09 CV 2366), which consolidated the Action with *Anwar v. Fairfield Greenwich Group*, 09 CV 0118 (VM); and

(iii) for such other and further relief as the Court may deem just and proper.

Dated: April 8, 2009

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, et al. v. FAIRFIELD GREENWICH LIMITED, et al.	:	Master File No. 09 CV 0118 (VM)
	:	09 CV 2366 (VM) (Ferber Action)

PLAINTIFF DAVID I. FERBER SEP IRA'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO REMAND AND TO VACATE CONSOLIDATION ORDER

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INTRODUCTION

Plaintiff David Ferber SEP IRA, a limited partner of nominal defendant Greenwich Sentry, L.P. ("Greenwich Sentry" or the "Fund"), filed this *derivative* action (09 Civ. 2366) on behalf of the Fund in the New York Supreme Court, County of New York. ¶ 1.[1] Defendant Fairfield Greenwich Advisors LLC ("FGA") improperly removed the action to this Court, invoking the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

CAFA grants federal courts subject matter jurisdiction over class actions, provided they meet certain requirements. Although FGA seeks to recharacterize (or, more accurately, mischaracterize) this action as a *class* action, nothing in CAFA permits such tactics. Because this is *not* a class action, there is no jurisdiction. Accordingly, the case should be remanded.

The Court also should vacate its March 24, 2009 Order, *see* Dkt. No. 5, 09 CV 2366, consolidating this action with the class action litigation, *Anwar v. Fairfield Greenwich Group*, 09 CV 0118 (VM) ("*Anwar*"). *See generally Anwar* Consolidation Order, Dkt. No. 21-2, ¶ 7, 09 CV 0118. As shown below, consolidation is inappropriate because, among other things, plaintiffs' counsel in the *Anwar* class action would be conflicted from prosecuting the derivative claims in this action.[2]

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[1] References to "¶ __" are to the "Limited Partner's Derivative Complaint" ("Complaint"), annexed as Exhibit A to the Amended Notice of Removal, dated March 19, 2009. *See* Dkt. No. 6, 09 CV 2366.

[2] The undersigned counsel also represent plaintiffs in *Pierce v. Fairfield Greenwich Group*, 09 CV 2588 (VM), which also was removed to this Court by FGA and recently consolidated with *Anwar*. *See* Dkt. No. 5, 09 CV 2588. It is anticipated that a similar motion to remand and to vacate the consolidation order in that action will be filed in the near future.

FACTUAL BACKGROUND

On February 13, 2009, plaintiff, a limited partner of nominal defendant Greenwich Sentry, filed a "Limited Partner's Derivative Complaint" on behalf of Greenwich Sentry. Greenwich Sentry is a limited partnership organized under the laws of Delaware, with principal offices in New York City. ¶ 14. The defendants include, among others, Fairfield Greenwich Limited, which served as the Fund's general partner from January 1998 to March 1, 2006, ¶ 16, and Fairfield Greenwich Advisors LLC, which provides administrative services for the Fund. ¶ 18. As alleged in the Complaint, in violation of their fiduciary duties, defendants mismanaged the Fund's business.

On December 10, 2008, it was publicly disclosed that Bernard Madoff, through his firm, Bernard L. Madoff Investment Securities, LLC ("BMIS"), had been running a Ponzi scheme. ¶ 2. All or almost all of the Fund's assets had been invested with Madoff and BMIS, ¶ 5, and it is believed that nearly all of the those assets have been lost. *Id.*

Plaintiff alleges that the defendants breached or aided and abetted breaches of duties owed to the Fund. Among other things, defendants failed to "safely manage the Fund's assets," ¶¶ 82(a), 90(a), 93(a), 97(a), and to investigate "red flags" regarding BMIS. ¶¶ 82(c), 90(c), 93(c), 97(c).

ARGUMENT

I. THE COURT SHOULD REMAND THE ACTION FOR LACK OF SUBJECT MATTER JURISDICTION

A. Defendant Bears the Burden of Proof

The Second Circuit has held that, under CAFA, defendant has the burden of establishing subject matter jurisdiction. *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) ("we hold that CAFA did not change the traditional rule and that defendant bears the burden of establishing federal subject matter jurisdiction"); *see also DiTolla v. Doral Dental IPA of New York, LLC*, 469 F.3d 271, 275 (2d Cir. 2006). The defendant can meet its burden only by "prov[ing] to a reasonable probability" that the CAFA requirements have been satisfied. *See Blockbuster*, 472 F.3d at 59.

In determining whether a defendant has met its burden, the Court should be mindful of the strong presumption against removal. "In light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability." *Lupo v. Human Affairs Int'l*, 28 F.3d 269, 274 (2d Cir. 1994) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941)); *see Chiropractic Neurodiagnostic, P.C. v. Allstate Ins. Co.*, No. 08-CV-2319, 2009 U.S. Dist. LEXIS 5822, at *7-8 (E.D.N.Y. Jan. 26, 2009) (remanding case removed under CAFA, explaining that "any doubts" must be "resolved against removability 'out of respect for the limited jurisdiction of the federal courts and the rights of states.'") (quoting *In re Methyl Tertiary Butyl Ether ("MTBE") Prods.*, 488 F.3d 112, 124 (2d Cir. 2007)); *Fisher v. Beverly Enters., Inc.*, No. 05-CV-00316, 2005 U.S. Dist. LEXIS 38870, at *3 (E.D. Ark. Dec. 12, 2005). Here, defendants cannot meet their burden.

B. This is Not a "Class Action"

CAFA establishes federal subject matter jurisdiction over class actions that meet certain requirements, including those relating to the amount in controversy, class size and diversity. *See* 28 U.S.C. § 1332(d). To qualify as a "class action" under CAFA, the case must have been "filed under" Rule 23 of the Federal Rules of Civil Procedure, or a state law counterpart. *See* 28 U.S.C. § 1332(d)(1)(B).[3]

[3] Section 1332(d)(1)(B) states:

[footnote continued]

Here, it is undisputed that the action was not "filed under" Rule 23 or a state law counterpart.[4] It was filed as a derivative action.[5] Thus, it does not qualify as a class action under CAFA. *See Beverly Enters.*, 2005 U.S. Dist. LEXIS 38870, at *5 (remanding case removed under CAFA: "Because the lawsuit was not filed under Rule 23 or a similar state statute as a class action, this Court has no jurisdiction."); *see generally Blockbuster*, 472 F.3d at 56 (explaining that section 1332(d)(1) "defines a class action as any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or a similar state rule …."); *compare with Mattera v. Clear Channel Commc'ns, Inc.*, 239 F.R.D. 70, 78 (S.D.N.Y. 2006) (action qualified as "class

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> the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action ….

28 U.S.C. § 1332(d)(1)(B).

[4] *See generally* N.Y. Civ. Prac. Law & Rules, Article 9 (Class Actions).

[5] FGA acknowledges that fact. *See* Amended Notice of Removal, at ¶ 1 (the case was brought as a "putative derivative action"). As the "master of the complaint," plaintiff gets to choose how to plead. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 387 (1987); *see also Sung v. Wasserstein*, 415 F. Supp. 2d 393, 398 (S.D.N.Y. 2006) (Marrero, J.) ("[A] plaintiff, as master of her complaint, is free to avoid federal jurisdiction by pleading only state claims even where a federal claim is also available") (internal quotations and citation omitted). "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 810 n.6 (1986).

Whether direct, non-derivative claims are available to the Fund's investors is thus beside the point. *But see Broome v. ML* Media *Opportunity Partners L.P.*, 273 A.D.2d 63, 64, 709 N.Y.S.2d 59, 60 (1st Dep't 2000) (limited partners lacked standing to assert class action claims that "allege no more other than the mismanagement and diversion of assets, and do not implicate any injury to plaintiffs distinct from the harm to the partnership.") (citations omitted); *Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 16 (Del. Ch. 1992) (holding that lawsuit, although brought as class action, was really a derivative action, noting that the "gist" of the complaint was that "the general partners breached their fiduciary duties by inadequately investigating and monitoring investments and by placing their interests in fees above the interest of the limited partners.").

action" under CAFA where plaintiff filed suit "on her own behalf and on behalf of a class of persons under [Fed. R. Civ. P.] 23(a), (b)(2), and (b)(3).") (brackets in original).

C. This is not a "Mass Action"

Under CAFA, if an action is not a "class action" under section 1332(d)(1)(B), it still may be "deemed" one if it is a "mass action" that otherwise satisfies the requirements of 28 U.S.C. §§ 1332(d)(2)-(10). *See* 28 U.S.C. § 1332(d)(11)(A). CAFA defines a "mass action" as

> any civil action … in which *monetary relief claims of 100 or more persons are proposed to be tried jointly* on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [section 1332](a).

28 U.S.C. § 1332(d)(11)(B) (emphasis added).

But here, the claims are *derivative* claims on behalf of the nominal defendant. Thus, the action does not assert individual claims (monetary or otherwise) of 100 persons -- much less claims of 100 persons that are proposed to be tried jointly. *See generally Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 57 A.D.3d 411, 869 N.Y.S.2d 506, 507 (1st Dep't 2008) ("Even if plaintiff limited partners' claims of fraudulent inducement are sufficient, as a legal matter, to support a direct claim against the partnership's auditor, … they failed to submit evidence to raise an issue of fact in opposition to defendant's prima facie showing that the damages claimed all emanated from losses that took place after the initial investment, did not affect plaintiffs differently from other limited partners, *and were therefore derivative* ….") (emphasis added) (citations omitted); *Kramer v. Western Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) ("Delaware courts have long recognized that actions charging 'mismanagement which depress[] the value of stock [allege] a wrong to the corporation; *i.e.*, the stockholders collectively, to be enforced by a derivative action.'") (brackets in original, citations omitted); *cf. Sung v.*

Wasserstein, 415 F. Supp. 2d 392, 408 (S.D.N.Y 2006) (Marrero, J.) (remanding derivative lawsuit that had been removed under Securities Litigation Uniform Standards Act ("SLUSA"), noting that the case was "not a class action").[6]

The absence of 100 claimants in the Complaint thus is fatal to any "mass action" approach. *See Villareal v. Dole Food Co.*, No. 09-CV-189, 2009 U.S. Dist. LEXIS 22892, at *13 (C.D. Cal. Mar. 9, 2009) ("These actions do not constitute 'mass actions' under CAFA because each of these actions has been brought by less than 100 plaintiffs."); *compare with Galstaldi v. Sunvest Cmtys. USA, LLC*, No. 08-CV-62076, 2009 U.S. Dist. LEXIS 16777, at *6 (S.D. Fla. Feb. 17, 2009) (action was "mass action" where, *inter alia*, "[t]he Complaint on its face names 177 individual Plaintiffs, thereby appearing to satisfy the numerosity requirement.").

Moreover, because the claims are derivative, no plaintiff -- much less 100 persons -- could satisfy the $75,000 jurisdictional amount required under 28 U.S.C. § 1332(a). Accordingly, there is no jurisdiction here.[7]

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[6] SLUSA requires, *inter alia*, that the lawsuit (or group of lawsuits) seek damages "on behalf of more than 50 persons …." *See* 15 U.S.C. § 77p(f)(2)(A). In *Sung*, the Court found that SLUSA's "conditions [had] not been satisfied" with respect to the derivative action. 415 F. Supp. 2d at 408, *see id*. at 407 ("None of these conditions are met here.").

[7] According to FGA, "the Complaint alleges that *Plaintiffs have suffered damages* based on the alleged mismanagement of $221 million, …, including the payment of 'over $9.5 million in fees … for duties not performed.'" *See* Amended Notice of Removal, at ¶ 7(f) (citing ¶¶ 36, 85) (emphasis added). But the Complaint does not describe those amounts as damages suffered by plaintiffs. And, of course, there is just one plaintiff in this action.

Moreover, the fact that limited partners may indirectly benefit from the successful prosecution of the litigation (in the sense that they are investors in an entity on whose behalf the derivative action is litigated) does not change the fact that this is a derivative action and not a class action. Indeed, conventional pleading practices recognize that investors can benefit from a derivative action. *See Bender's Forms of Pleading of the State of New York*, Form No. 6:13, Allegations in Shareholders' Derivative Action, ¶ 1 (available on LEXIS; jurisdiction: New York; source categories: Forms) ("[P]laintiff was and still is a stockholder of the defendant … and sues on behalf of himself (*or* herself) and all other stockholders of the defendant corporation."); *Bender's*

[footnote continued]

D. CAFA's Exclusions Preclude Jurisdiction

Even assuming, *arguendo*, that this were a class action and otherwise satisfied CAFA's requirements, jurisdiction still would be unavailable because the claims of the class hypothesized by FGA implicate the internal affairs of the nominal defendant, Greenwich Sentry, and the duties that defendants owed it. CAFA, however, excludes such claims from its reach. Specifically, CAFA provides that subject matter jurisdiction under section § 1332(d)(2) "shall not apply to any class action that solely involves a claim"

> that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized ….

28 U.S.C. § 1332(d)(9)(B).

In this case, the claims arise under state law and quintessentially relate to the "internal affairs or governance" of Greenwich Sentry, including defendants' mismanagement of the Fund's affairs and their failure to discharge their fiduciary duties.[8] As such, even if this were a class action (it is not), there would be no jurisdiction under section 1332(d)(2)(B). As the

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Federal Practice Forms, Form No. 23.1:11, Complaint in Stockholder's Suit Based on Conspiracy to Waste and Misappropriate Assets, ¶ 3 (available on LEXIS; jurisdiction: Federal; source categories: Forms) (form for derivative complaint under Fed. R. Civ. P. 23.1: "Plaintiffs bring this action on behalf of themselves and all other stockholders of _______ [*name of first corporate defendant*] similarly situated."); *West's McKinney's Forms*, Derivative Actions, § 8:2 (available on Westlaw; database: MCF-BCL; citation text: MCF Business 8:2) (form for derivative complaint under N.Y. Bus. Corp. Law § 626: "The plaintiff …, complaining of the defendants, in the right of *[name of defendant corporation]*, to procure a judgment in its favor, and suing on behalf of all the shareholders thereof similarly situated, respectfully shows and alleges ….").

[8] In *Blockbuster*, the Second Circuit raised, but did not resolve, the issue as to which party bears the burden of proof concerning CAFA's "exceptions" under 28 U.S.C. §§ 1332(d)(3) and (5). *See* 472 F.3d at 58. Plaintiff submits that, as to 28 U.S.C. § 1332(d)(9)(B), defendants bear the burden of proof. The issue, however, is academic here because even if plaintiff bears the burden, it has been satisfied.

Northern District of California court explained in finding that CAFA jurisdiction was unavailable under section 1332(d)(9)(B):

> [P]laintiff alleges defendants, in their role as general partners of the Textainer partnerships, (1) rendered the sale of the assets of the partnerships "fundamentally unfair" to the limited partners by demanding that all potential bidders agree to enter into a management contract with one of the defendants, (2) rendered the sale "fundamentally unfair" to the limited partners by undervaluing Textainer's assets, and (3) gained support for the sale by distributing materially misleading proxy statements to the limited partners. Each of these alleged acts affects plaintiff and the other limited partners solely in their capacity as limited partners of the Textainer partnerships. Indeed, plaintiff essentially claims that defendants "fraudulent[ly] or negligent[ly] mismanage[d]" the partnership's affairs, and "unlawfully profit[ed] at the [partnership's] expense." Moreover, the fiduciary duties allegedly breached arise solely because of the parties' relationship as partners of the Textainer partnerships.

In re Textainer P'ship Sec. Litig., No. 05-CV-0969, 2005 U.S. Dist. LEXIS 26711, at *19-20 (N.D. Cal. July 27, 2005) (brackets in original, citations omitted).[9]

E. Plaintiff Should be Awarded Costs

Under 28 U.S.C. §1447(c), the court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." In evaluating such relief, the Court properly considers whether the removing party "lacked an objectively reasonable basis

[9] We also submit that, even if this were a class action under CAFA, jurisdiction also would be unavailable because of section 1332(d)(9)(C). That section provides that section 1332(d)(2) "shall not apply to any class action that solely involves a claim … that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder)." 28 U.S.C. § 1332(d)(9)(C). *See Textainer P'ship*, 2005 U.S. Dist. LEXIS 26711, at *24 (§ 1332(d)(9)(C) applied "[b]ecause the sole claim in the *Labow* action concerns, exclusively, 'fiduciary duties relating to or created by or pursuant to' the limited partnership interests in the Textainer partnerships, and those interests are securities"); *Estate of Pew v. Cardarelli*, 527 F.3d 25, 35-38 (2d Cir. 2008) (Poller, J., dissenting). We are aware that our position is contrary to the Panel's majority ruling in *Pew*, *see* 527 F.3d at 31-32, and respectfully submit that the majority erred. Nonetheless, we raise the issue now to preserve it for possible appellate review and rectification.

for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Here, there was no reasonable basis for the removal. Accordingly, plaintiff should be awarded costs.

II. THE COURT SHOULD VACATE THE CONSOLIDATION ORDER

By Order dated March 24, 2009, the Court consolidated this derivative action with the *Anwar* class action litigation "for all purposes."[10] In accordance with paragraph 7 of the January 27, 2009 Order in *Anwar*, plaintiff moves to vacate the consolidation order. It should be vacated for two reasons.

First, as shown above, there is no subject matter jurisdiction here. In the absence of such jurisdiction, the consolidation order should be vacated. *See Textainer P'ship*, 2005 U.S. Dist. LEXIS 26711, at *32.

Second, prosecution of these derivative claims by the class action plaintiffs and their counsel in the *Anwar* federal class action would create an impermissible conflict of interest. *See St. Clair Shores Gen. Employees Ret. Sys. v. Eibeler*, No. 06-CV-688, 2006 U.S. Dist. LEXIS 72316, at *23 (S.D.N.Y. Oct. 4, 2006) ("Courts in this Circuit have long found that plaintiffs attempting to advance derivative and direct claims in the same action face an impermissible conflict of interest.") (citing authorities). For that reason alone, consolidation is not appropriate.

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[10] *See* Dkt. No. 5, 09 CV 2366. By Order dated March 31, 2009, the Court also consolidated another derivative action, the *Pierce* action, with *Anwar* "for all purposes." *See* Dkt. No. 5, 09 CV 2588. Subsequently, by memo-endorsed Order filed April 6, 2009, the Court indicated that the consolidation of *Pierce* with *Anwar* was for the purposes of promoting "coordination of discovery and other pretrial proceedings." *See* Dkt. No. 7, 09 CV 2588.

CONCLUSION

For the foregoing reasons, the case should be remanded to state court, and the consolidation order should be vacated.

Dated: April 8, 2009

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, et al. v. FAIRFIELD GREENWICH LIMITED, et al.	:	Master File No. 09 CV 0118 (VM)
	:	09 CV 2588 (VM) (Pierce Action)

PIERCE PLAINTIFFS' NOTICE OF MOTION (i) TO REMAND, (ii) TO STRIKE THORNE DECLARATION AND (iii) TO VACATE CONSOLIDATION ORDER

PLEASE TAKE NOTICE that Frank E. Pierce and Frank E. Pierce IRA, plaintiffs in No. 09 CV 2588 (VM) (the "Action"), by their undersigned counsel, upon the accompanying declaration of Robert A. Wallner, Esq. and memorandum of law, and all prior papers had herein, hereby move the Court for an Order:

(i) pursuant to 28 U.S.C. § 1447(c), remanding the Action to the Supreme Court of the State of New York, County of New York, and awarding plaintiffs costs incurred as a result of the removal of the Action;

(ii) striking the declaration of Michael Thorne, dated March 19, 2009 (Dkt. 1, Exhibit B, 09 CV 2588);

(iii) vacating the Court's Order dated March 31, 2009 (Dkt. No. 5, 09 CV 2588), which consolidated the Action with *Anwar v. Fairfield Greenwich Group,* 09 CV 0118 (VM); and

(iv) awarding such other and further relief as the Court may deem just and proper.

Dated: April 14, 2009

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, et al. v. FAIRFIELD GREENWICH LIMITED, et al.	:	Master File No. 09 CV 0118 (VM)
	:	09 CV 2588 (VM) (Pierce Action)

PIERCE PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION (i) TO REMAND, (ii) TO STRIKE THORNE DECLARATION AND (iii) TO VACATE CONSOLIDATION ORDER

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INTRODUCTION

Plaintiffs Frank E. Pierce and Frank E. Pierce IRA, limited partners of nominal defendant Greenwich Sentry Partners, L.P. ("Greenwich Sentry" or the "Fund"), filed this *derivative* action (09 Civ. 2588) on behalf of the Fund in the New York Supreme Court, County of New York. ¶ 1.[1] Defendant Fairfield Greenwich Advisors LLC ("FGA") improperly removed the action to this Court, invoking the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

Plaintiffs acknowledge that CAFA grants federal courts subject matter jurisdiction over certain *class* actions, but it manifestly does not confer such jurisdiction over *derivative* actions. Although FGA seeks to re-characterize (or, more accurately, mischaracterize) this action as a *class* action, nothing in CAFA permits such tactics. Because this is *not* a class action, there is no jurisdiction. Accordingly, the case should be remanded.

The Court also should strike the two-paragraph declaration of Michael Thorne submitted in support of the removal. *See* Dkt. No. 1, Exhibit B. As shown below, the declaration is impermissibly conclusory and rank hearsay.

Finally, the Court should vacate its March 31, 2009 Order (Dkt. No. 5), consolidating this action with the class action litigation, *Anwar v. Fairfield Greenwich Group*, 09 CV 0118 (VM) ("*Anwar*"). *See generally Anwar* Consolidation Order, Dkt. No. 21-2, ¶ 7, 09 CV 0118. As shown below, consolidation is inappropriate because, among other things, plaintiffs' counsel in the *Anwar* class action would have a conflict in prosecuting the derivative claims in this action.[2]

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[1] References to "¶ __" are to the "Limited Partners' Derivative Complaint" ("Complaint"), annexed as Exhibit A to the Notice of Removal, filed March 19, 2009. *See* Dkt. No. 1, 09 CV 2588. Docket Numbers ("Dkt. No. __"), unless otherwise stated, refer to entries in 09 CV 2588.

FACTUAL BACKGROUND

On February 17, 2009, plaintiffs, limited partners of nominal defendant Greenwich Sentry, filed a "Limited Partners' Derivative Complaint" on behalf of Greenwich Sentry. Greenwich Sentry is a limited partnership organized under the laws of Delaware, with principal offices in New York City. ¶ 15. The defendants include, among others, Fairfield Greenwich (Bermuda) Ltd., which serves as the Fund's general partner, ¶ 17, and Fairfield Greenwich Advisors LLC, which provides administrative services for the Fund. ¶ 18. As alleged in the Complaint, in violation of their fiduciary duties, defendants mismanaged the Fund's business.

In December 2008, Bernard Madoff admitted to government authorities that he had been running a multi-billion dollar Ponzi scheme through his firm, Bernard L. Madoff Investment Securities, LLC ("BMIS"). ¶ 2. All or almost all of the Fund's assets had been invested with Madoff and BMIS, ¶ 5, and it is believed that nearly all of those assets have been lost. *Id.*

Plaintiffs allege that the defendants, who have pocketed hundreds of millions of dollars in management, incentive and administrator fees, ¶ 7, breached or aided and abetted breaches of duties owed to the Fund. Among other things, defendants failed to "safely manage the Fund's assets," ¶¶ 81(a), 90(a), 93(a), 97(a), and to investigate "red flags" regarding BMIS. ¶¶ 81(c), 90(c), 93(c), 97(c).

[2] The undersigned counsel also represent plaintiff in *Ferber v. Fairfield Greenwich Group*, 09 CV 2366 (VM). On April 8, 2009, counsel filed a motion to remand and vacate a consolidation order in that case.

ARGUMENT

I. THE COURT SHOULD REMAND THE ACTION FOR LACK OF SUBJECT MATTER JURISDICTION

A. Defendant Bears the Burden of Proof

The Second Circuit has held that, under CAFA, defendant bears the burden of establishing subject matter jurisdiction. *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) ("we hold that CAFA did not change the traditional rule and that defendant bears the burden of establishing federal subject matter jurisdiction"); *see also DiTolla v. Doral Dental IPA of New York, LLC,* 469 F.3d 271, 275 (2d Cir. 2006). The defendant can meet its burden only by "prov[ing] to a reasonable probability" that CAFA's requirements have been satisfied. *See Blockbuster*, 472 F.3d at 59.

In determining whether a defendant has met its burden, the Court should be mindful of the strong presumption against removal. "In light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability." *Lupo v. Human Affairs Int'l*, 28 F.3d 269, 274 (2d Cir. 1994) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941)); *see Chiropractic Neurodiagnostic, P.C. v. Allstate Ins. Co.*, No. 08-CV-2319, 2009 U.S. Dist. LEXIS 5822, at *7-8 (E.D.N.Y. Jan. 26, 2009) (remanding case removed under CAFA, explaining that "any doubts" must be "resolved against removability 'out of respect for the limited jurisdiction of the federal courts and the rights of states.'") (quoting *In re Methyl Tertiary Butyl Ether ("MTBE") Prods.*, 488 F.3d 112, 124 (2d Cir. 2007)); *Fisher v. Beverly Enters., Inc.*, No. 05-CV-00316, 2005 U.S. Dist. LEXIS 38870, at *3 (E.D. Ark. Dec. 12, 2005). Here, defendants cannot meet their burden.

B. This is Not a "Class Action"

CAFA establishes federal subject matter jurisdiction over class actions that meet certain requirements, including those relating to the amount in controversy, class size and diversity. *See* 28 U.S.C. § 1332(d). To qualify as a "class action" under CAFA, the case must have been "filed under" Rule 23 of the Federal Rules of Civil Procedure, or a state law counterpart. *See* 28 U.S.C. § 1332(d)(1)(B).[3] Also, there must be at least 100 members of the proposed class. See 28 U.S.C. 1332(5)(B).[4] As shown below, these requirements are not met here.

1. The "Filing" Requirement is Not Met

It is undisputed that the action was not "filed under" Rule 23 or a state law counterpart.[5] It was filed as a derivative action.[6] Thus, it does not qualify as a class action under CAFA. *See*

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[3] Section 1332(d)(1)(B) states:

> the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action ….

28 U.S.C. § 1332(d)(1)(B).

[4] Section 1332(d)(5)(B) provides:

> Paragraphs (2) through (4) [28 U.S.C. §§ 1332(d)(2) - (4)] shall not apply to any class action in which *** the number of members of all proposed plaintiff classes in the aggregate is less than 100.

28 U.S.C. § 1332(d)(5)(B). *See Blockbuster*, 472 F.3d at 57 (the 100-person requirement is a "prerequisite[]" for CAFA jurisdiction).

[5] *See generally* N.Y. Civ. Prac. Law & Rules, Article 9 (Class Actions).

[6] FGA acknowledges that fact. *See* Notice of Removal, at ¶ 1 (the case was brought as a "putative derivative action"). As the "master of the complaint," plaintiff gets to choose how to plead. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 387 (1987); *see also Sung v. Wasserstein*, 415 F. Supp. 2d 393, 398 (S.D.N.Y. 2006) (Marrero, J.) ("[A] plaintiff, as master of her complaint, is free to avoid federal jurisdiction by pleading only state claims even where a federal claim is also available") (internal quotations and citation omitted). "Jurisdiction may not

[footnote continued]

Beverly Enters., 2005 U.S. Dist. LEXIS 38870, at *5 (remanding case removed under CAFA: "Because the lawsuit was not filed under Rule 23 or a similar state statute as a class action, this Court has no jurisdiction."); *see generally Blockbuster*, 472 F.3d at 56 (explaining that section 1332(d)(1) "defines a class action as any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or a similar state rule …."); *compare with Mattera v. Clear Channel Commc'ns, Inc.*, 239 F.R.D. 70, 78 (S.D.N.Y. 2006) (action qualified as "class action" under CAFA where plaintiff filed suit "on her own behalf and on behalf of a class of persons under [Fed. R. Civ. P.] 23(a), (b)(2), and (b)(3).") (brackets in original).

2. The 100-Person Requirement is Not Met

Even assuming, *arguendo*, that this case had been "filed" as a class action, it still would not satisfy CAFA's 100-person requirement. Although FGA argues that the action was brought to benefit the Fund's limited partners, *see* Notice of Removal ¶ 6(e), FGA's counsel has represented that the Fund has just 29 current limited partners, and 5 former limited partners. *See* Exhibit A to April 14, 2009 Declaration of Robert A. Wallner, Esq., filed herewith. Thus, even under defendant's argument, the 100-person requirement is not met.

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be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 810 n.6 (1986).

Whether direct, non-derivative claims are available to the Fund's investors is thus beside the point. *But see Broome v. ML Media Opportunity Partners L.P.*, 273 A.D.2d 63, 64, 709 N.Y.S.2d 59, 60 (1st Dep't 2000) (limited partners lacked standing to assert class action claims that "allege no more other than the mismanagement and diversion of assets, and do not implicate any injury to plaintiffs distinct from the harm to the partnership.") (citations omitted); *Litman v. Prudential-Bache Props., Inc.*, 611 A.2d 12, 16 (Del. Ch. 1992) (holding that lawsuit, although brought as class action, was really a derivative action, noting that the "gist" of the complaint was that "the general partners breached their fiduciary duties by inadequately investigating and monitoring investments and by placing their interests in fees above the interest of the limited partners.").

C. This is Not a "Mass Action"

Under CAFA, if an action is not a "class action" under section 1332(d)(1)(B), it still may be "deemed" one if it is a "mass action" that otherwise satisfies the requirements of 28 U.S.C. §§ 1332(d)(2)-(10). *See* 28 U.S.C. § 1332(d)(11)(A). CAFA defines a "mass action" as

> any civil action … in which *monetary relief claims of 100 or more persons are proposed to be tried jointly* on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [section 1332](a).

28 U.S.C. § 1332(d)(11)(B) (emphasis added).

But here, the claims are *derivative* claims on behalf of the nominal defendant. Thus, the action does not assert individual claims (monetary or otherwise) of 100 persons -- much less claims of 100 persons that are proposed to be tried jointly. *See generally Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 57 A.D.3d 411, 869 N.Y.S.2d 506, 507 (1st Dep't 2008) ("Even if plaintiff limited partners' claims of fraudulent inducement are sufficient, as a legal matter, to support a direct claim against the partnership's auditor, … they failed to submit evidence to raise an issue of fact in opposition to defendant's prima facie showing that the damages claimed all emanated from losses that took place after the initial investment, did not affect plaintiffs differently from other limited partners, *and were therefore derivative* ….") (emphasis added) (citations omitted); *Kramer v. Western Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) ("Delaware courts have long recognized that actions charging 'mismanagement which depress[] the value of stock [allege] a wrong to the corporation; *i.e.*, the stockholders collectively, to be enforced by a derivative action.'") (brackets in original, citations omitted); *cf. Sung v. Wasserstein*, 415 F. Supp. 2d 393, 408 (S.D.N.Y 2006) (Marrero, J.) (remanding derivative lawsuit that had been removed under Securities Litigation Uniform Standards Act ("SLUSA"), noting that the case was "not a class action").[7] *See also* Section B.2., above.

The absence of 100 claimants in the Complaint thus is fatal to any "mass action" approach. *See Tanoh v. Dow Chem. Co.*, No. 09-55138, 2009 U.S. App. LEXIS 6931, at *20-21 (9th Cir. Mar. 27, 2009) (affirming remand: CAFA's "mass action" provision did not permit removal of cases, each of which asserted claims of fewer than 100 plaintiffs); *compare with Galstaldi v. Sunvest Cmtys. USA, LLC*, No. 08-CV-62076, 2009 U.S. Dist. LEXIS 16777, at *6 (S.D. Fla. Feb. 17, 2009) (action was "mass action" where, *inter alia*, "[t]he Complaint on its face names 177 individual Plaintiffs, thereby appearing to satisfy the numerosity requirement.").

Moreover, because the claims are derivative, no plaintiff -- much less 100 persons -- could satisfy the $75,000 jurisdictional amount required under 28 U.S.C. § 1332(a). Accordingly, there is no jurisdiction here.[8]

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[7] SLUSA requires, *inter alia*, that the lawsuit (or group of lawsuits) seek damages "on behalf of more than 50 persons …." *See* 15 U.S.C. § 77p(f)(2)(A). In *Sung*, the Court found that SLUSA's "conditions [had] not been satisfied" with respect to the derivative action. 415 F. Supp. 2d at 408, *see id*. at 407 ("None of these conditions are met here.").

[8] According to FGA, "the Complaint alleges that *Plaintiffs have suffered damages* based on the alleged mismanagement of $9 million." *See* Notice of Removal, at ¶ 6(f) (emphasis added). But the Complaint does not describe those amounts as damages suffered by plaintiffs.

Moreover, the fact that limited partners may indirectly benefit from the successful prosecution of the litigation (in the sense that they are investors in an entity on whose behalf the derivative action is litigated) does not change the fact that this is a derivative action and not a class action. Indeed, conventional pleading practices recognize that investors can benefit from a derivative action. *See Bender's Forms of Pleading of the State of New York*, Form No. 6:13, Allegations in Shareholders' Derivative Action, ¶ 1 (available on LEXIS; jurisdiction: New York; source categories: Forms) ("[P]laintiff was and still is a stockholder of the defendant … and sues on behalf of himself (*or* herself) and all other stockholders of the defendant corporation."); *Bender's Federal Practice Forms*, Form No. 23.1:11, Complaint in Stockholder's Suit Based on Conspiracy to Waste and Misappropriate Assets, ¶ 3 (available on LEXIS; jurisdiction: Federal; source categories: Forms) (form for derivative complaint under Fed. R. Civ. P. 23.1: "Plaintiffs bring this action on behalf of themselves and all other stockholders of _______ [*name of first*

[footnote continued]

D. CAFA's Exclusions Preclude Jurisdiction

Even assuming, *arguendo*, that this were a class action that otherwise satisfied CAFA's requirements, jurisdiction still would be unavailable because the claims of the class hypothesized by FGA implicate the internal affairs of the nominal defendant, Greenwich Sentry, and the duties that defendants owed it. CAFA excludes such claims from its reach. Specifically, CAFA provides that subject matter jurisdiction under section § 1332(d)(2) "shall not apply to any class action that solely involves a claim"

> that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized ….

28 U.S.C. § 1332(d)(9)(B).

In this case, the claims arise under state law and quintessentially relate to the "internal affairs or governance" of Greenwich Sentry, including defendants' mismanagement of the Fund's affairs and their failure to discharge their fiduciary duties.[9] As such, even if this were a class action (it is not), there would be no jurisdiction under section 1332(d)(2)(B). As the Northern District of California court explained in finding that CAFA jurisdiction was unavailable under section 1332(d)(9)(B):

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corporate defendant] similarly situated."); *West's McKinney's Forms*, Derivative Actions, § 8:2 (available on Westlaw; database: MCF-BCL; citation text: MCF Business 8:2) (form for derivative complaint under N.Y. Bus. Corp. Law § 626: "The plaintiff …, complaining of the defendants, in the right of *[name of defendant corporation]*, to procure a judgment in its favor, and suing on behalf of all the shareholders thereof similarly situated, respectfully shows and alleges .…").

[9] In *Blockbuster*, the Second Circuit raised, but did not resolve, the issue as to which party bears the burden of proof concerning CAFA's "exceptions" under 28 U.S.C. §§ 1332(d)(3) and (5). *See* 472 F.3d at 58. Plaintiff submits that, as to 28 U.S.C. § 1332(d)(9)(B), defendants bear the burden of proof. The issue, however, is academic here because even if plaintiff bears the burden, it has been satisfied.

> [P]laintiff alleges defendants, in their role as general partners of the Textainer partnerships, (1) rendered the sale of the assets of the partnerships "fundamentally unfair" to the limited partners by demanding that all potential bidders agree to enter into a management contract with one of the defendants, (2) rendered the sale "fundamentally unfair" to the limited partners by undervaluing Textainer's assets, and (3) gained support for the sale by distributing materially misleading proxy statements to the limited partners. Each of these alleged acts affects plaintiff and the other limited partners solely in their capacity as limited partners of the Textainer partnerships. Indeed, plaintiff essentially claims that defendants "fraudulent[ly] or negligent[ly] mismanage[d]" the partnership's affairs, and "unlawfully profit[ed] at the [partnership's] expense." Moreover, the fiduciary duties allegedly breached arise solely because of the parties' relationship as partners of the Textainer partnerships.

In re Textainer P'ship Sec. Litig., No. 05-CV-0969, 2005 U.S. Dist. LEXIS 26711, at *19-20 (N.D. Cal. July 27, 2005) (brackets in original, citations omitted).[10]

E. Plaintiffs Should be Awarded Costs

Under 28 U.S.C. §1447(c), the court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." In evaluating such relief, the Court properly considers whether the removing party "lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Here, there was no reasonable basis for the removal. To the contrary, it was pure stratagem. Accordingly, plaintiffs should be awarded costs.

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[10] We also submit that, even if this were a class action under CAFA, jurisdiction also would be unavailable because of section 1332(d)(9)(C). That section provides that section 1332(d)(2) "shall not apply to any class action that solely involves a claim … that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder)." 28 U.S.C. § 1332(d)(9)(C). *See Textainer P'ship*, 2005 U.S. Dist. LEXIS 26711, at *24 (§ 1332(d)(9)(C) applied "[b]ecause the sole claim in the *Labow* action concerns, exclusively, 'fiduciary duties relating to or created by or pursuant to' the limited partnership interests in the Textainer partnerships, and those interests are securities"); *Estate of Pew v. Cardarelli*, 527 F.3d 25, 35-38 (2d Cir. 2008) (Poller, J., dissenting). We are aware that our position is contrary to the Panel's majority ruling in *Pew, see* 527 F.3d at 31-32, and respectfully submit that the majority erred. Nonetheless, we raise the issue now to preserve it for possible appellate review and rectification.

II. THE COURT SHOULD STRIKE THE THORNE DECLARATION

The two-paragraph declaration of FGA Managing Director and Associate General Counsel Michael Thorne (Exhibit B to Notice of Removal, *see* Dkt. No. 1) should be stricken. The declaration states:

> Based on records and information obtained by Greenwich Sentry Partners, L.P., the number of persons who allegedly suffered damages in the proposed class exceeds 100.

Thorne Decl. ¶ 2. "A vaguer and more conclusory affidavit is hard to imagine." *Posadas de Puerto Rico, Inc. v. Radin*, 856 F.2d 399, 401 (1st Cir. 1988). Indeed, Thorne fails to disclose such basic information as the criteria used to calculate the 100-plus number, any description of the 100-plus persons, or how he determined that each of those persons was allegedly damaged. For that reason, the declaration should be stricken. *See Wahad v. FBI*, 179 F.R.D. 429, 435 (S.D.N.Y. 1998)

Moreover, Thorne's declaration admits that the 100-plus number (however calculated) is based on records and information obtained by the Fund -- none of which have been identified. The declaration thus is rank hearsay and should be stricken for that reason as well. *See John Hancock Prop. and Cas. Ins. Co. v. Universale Ins. Co.*, 147 F.R.D. 40, 44-45 (S.D.N.Y. 1993) (refusing to consider managing director's affidavit, where his statements were based on a review of his company's records and other documents); *Wahad*, 179 F.R.D. at 435 (striking portions of lawyer's affidavit that were "fraught with improper legal conclusions, ultimate facts, conclusory statements, and inadmissible hearsay."); *see generally Sellers v. M.C. Floor Crafters, Inc.*, 842 F.2d 639, 643 (2d Cir. 1988) ("[A] hearsay affidavit is not a substitute for the personal knowledge of a party.") (citations omitted); Fed. R. Evid. 602.

III. THE COURT SHOULD VACATE THE CONSOLIDATION ORDER

By Order dated March 31, 2009, the Court consolidated this derivative action with the *Anwar* class action litigation "for all purposes."[11] In accordance with paragraph 7 of the January 27, 2009 Order in *Anwar*, plaintiffs move to vacate the consolidation order. It should be vacated for two reasons.

First, as shown above, there is no subject matter jurisdiction here. In the absence of such jurisdiction, the consolidation order should be vacated. *See Textainer P'ship*, 2005 U.S. Dist. LEXIS 26711, at *32.

Second, prosecution of these derivative claims by the class action plaintiffs and their counsel in the *Anwar* federal class action would create an impermissible conflict of interest. *See St. Clair Shores Gen. Employees Ret. Sys. v. Eibeler,* No. 06-CV-688, 2006 U.S. Dist. LEXIS 72316, at *23 (S.D.N.Y. Oct. 4, 2006) ("Courts in this Circuit have long found that plaintiffs attempting to advance derivative and direct claims in the same action face an impermissible conflict of interest.") (citing authorities). For that reason alone, consolidation is not appropriate.

[11] S*ee* Dkt. No. 5. Subsequently, by Order filed April 6, 2009, the Court indicated that the consolidation was for the purposes of promoting "coordination of discovery and other pretrial proceedings." *See* Dkt. No. 7.

CONCLUSION

For the foregoing reasons, the case should be remanded to state court, the Thorne declaration should be stricken, and the consolidation order should be vacated.

Dated: April 14, 2009

/s/ Robert A. Wallner
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANWAR, et al. v. FAIRFIELD GREENWICH LIMITED, et al.	Master File No. 09 CV 0118 (VM) 09 CV 2588 (VM) (Pierce Action)

DECLARATION OF ROBERT A. WALLNER

ROBERT A. WALLNER, under penalty of perjury, declares that the following is true:

1. I am a member of the Bar of this Court and of the firm of Milberg LLP, One Pennsylvania Plaza, New York, NY 10119, attorneys for the plaintiffs in 09 CV 2588 (VM) ("*Pierce* Action"). I submit this declaration in support of the motion of the *Pierce* plaintiffs, among other things, to remand the *Pierce* Action to the Supreme Court of the State of New York, Court of New York.

2. Attached hereto as Exhibit A is a true and correct copy of a letter to me, dated April 14, 2009, from Peter E. Kazanoff, Esq., of Simpson Thacher & Bartlett LLP, attorneys for defendant Fairfield Greenwich Advisors LLC.

Dated: April 14, 2009

Robert A. Wallner

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EXHIBIT A

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BY EMAIL

April 14, 2009

Re: *Pierce et al. v. Fairfield Greenwich Group et al.*, Docket No. 09 CV 2588 (VM)

Robert A. Wallner
Milberg LLP
One Pennsylvania Plaza
New York, NY 10119

Dear Robert:

Per your request, I am writing to confirm the number of current limited partners in Greenwich Sentry Partners, L.P. (the "Fund") is twenty nine, and the number of limited partners who have fully redeemed their interests in the Fund since it was established is five.

Sincerely,

Peter E. Kazanoff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORNING MIST HOLDINGS LIMITED and MIGUEL LOMELI, Plaintiffs, vs. FAIRFIELD GREENWICH GROUP, Defendants.	x : : : : : : : : x	09 CV 5012 (VM)

PLAINTIFFS' NOTICE OF MOTION TO REMAND TO STATE COURT

PLEASE TAKE NOTICE that plaintiffs Morning Mist Holdings Limited and Miguel Lomeli, by their undersigned counsel, upon the accompanying memorandum of law and all prior papers had herein, hereby move the Court for an Order:

(i) pursuant to 28 U.S.C. § 1447(c), remanding the action to the Supreme Court of the State of New York, County of New York, and awarding plaintiffs costs incurred as a result of the removal of the action; and

(ii) awarding such other and further relief as the Court may deem just and proper.

Dated: New York, New York
June 8, 2009

/s/ Robert A. Wallner

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MORNING MIST HOLDINGS LIMITED and MIGUEL LOMELI, Plaintiffs, vs. FAIRFIELD GREENWICH GROUP, Defendants.	x : : : : : : : : x	09 CV 5012 (VM)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO REMAND ACTION TO STATE COURT

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INTRODUCTION

Plaintiffs Morning Mist Holdings Limited and Miguel Lomeli, shareholders of nominal defendant Fairfield Sentry Limited ("Fairfield Sentry" or the "Fund"), filed this *derivative* action on behalf of the Fund in the New York Supreme Court, County of New York. ¶ 1.[1] Defendant Fairfield Greenwich Advisors LLC ("FGA") improperly removed the action to this Court, invoking the Class Action Fairness Act of 2005 ("CAFA"), Pub. L. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

Plaintiffs acknowledge that CAFA grants federal courts subject matter jurisdiction over certain *class* actions, but it manifestly does not confer such jurisdiction over *derivative* actions. Although FGA seeks to re-characterize (or, more accurately, mischaracterize) this action as a *class* action, nothing in CAFA permits such tactics. Because this is *not* a class action, there is no jurisdiction. Accordingly, the case should be remanded.[2]

FACTUAL BACKGROUND

On May 15, 2009, plaintiffs, shareholders of Fairfield Sentry, filed a "Shareholders' Derivative Complaint" on behalf of Fairfield Sentry. Defendants include, among others, FGA, which provides administrative services for the Fund, and Fairfield Greenwich (Bermuda) Ltd., which serves as the Fund's investment manager. ¶¶ 24-25. As alleged in the Complaint, in violation of their fiduciary duties, defendants mismanaged the Fund's business.

---

[1] References to "¶ __" are to the "Shareholders' Derivative Complaint" ("Complaint"), annexed as Exhibit A to the Notice of Removal filed on May 28, 2009. *See* Dkt. No. 1.

[2] The undersigned counsel also represent plaintiffs in the derivative actions *Ferber SEP IRA v. Fairfield Greenwich Group*, 09 CV 2366 (VM), and *Pierce v. Fairfield Greenwich Group*, 09 CV 2588 (VM). Motions to remand have been filed in those cases.

In December 2008, Bernard Madoff admitted to authorities that he had been running a multi-billion dollar Ponzi scheme through his firm, Bernard L. Madoff Investment Securities, LLC ("BMIS"). ¶ 4. Billions of dollars of the Fund's assets had been invested with Madoff and BMIS, ¶¶ 6, 236, and it is believed that nearly all of those assets have been lost. ¶¶ 7, 236.

Plaintiffs allege that the defendants, who have pocketed hundreds of millions of dollars in management, incentive and administrator fees, ¶ 9, breached or aided and abetted breaches of duties owed to the Fund. Among other things, defendants failed to "safely manage" the Fund's assets and to investigate "red flags" regarding BMIS. ¶¶ 112(a, c), 123(a, c), 131(a, c), 137(a, c), 139(a, c).

ARGUMENT

THE COURT SHOULD REMAND THE ACTION

A. Defendant Bears the Burden of Proof

Defendant bears the burden of establishing subject matter jurisdiction under CAFA. *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) ("we hold that CAFA did not change the traditional rule and that defendant bears the burden of establishing federal subject matter jurisdiction"); *see also DiTolla v. Doral Dental IPA of New York, LLC*, 469 F.3d 271, 275 (2d Cir. 2006). The defendant can meet its burden only by "prov[ing] to a reasonable probability" that CAFA's requirements have been satisfied. *See Blockbuster*, 472 F.3d at 59.

In determining whether a defendant has met its burden, the Court should be mindful of the strong presumption against removal. "In light of the congressional intent to restrict federal court jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability." *Lupo v. Human Affairs Int'l*, 28 F.3d 269, 274 (2d Cir. 1994) (citing *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108 (1941)); *see Chiropractic Neurodiagnostic, P.C. v.*

Allstate Ins. Co., No. 08-CV-2319, 2009 U.S. Dist. LEXIS 5822, *7-8 (E.D.N.Y. Jan. 26, 2009) (remanding case removed under CAFA, explaining that "any doubts" must be "resolved against removability 'out of respect for the limited jurisdiction of the federal courts and the rights of states.'") (quoting *In re Methyl Tertiary Butyl Ether ("MTBE") Prods.*, 488 F.3d 112, 124 (2d Cir. 2007)); *Fisher v. Beverly Enters., Inc.*, No. 05-CV-00316, 2005 U.S. Dist. LEXIS 38870, *3 (E.D. Ark. Dec. 12, 2005). Here, defendants cannot meet their burden.

B. This is Not a "Class Action"

CAFA establishes federal subject matter jurisdiction over class actions that meet certain requirements, including those relating to the amount in controversy, class size and diversity. *See* 28 U.S.C. § 1332(d). To qualify as a "class action" under CAFA, the case must have been "filed under" Rule 23 of the Federal Rules of Civil Procedure, or a state law counterpart. *See* 28 U.S.C. § 1332(d)(1)(B).[3] Also, there must be at least 100 members of the proposed class. *See* 28 U.S.C. 1332(5)(B).[4] As shown below, these requirements are not met here.

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[3] Section 1332(d)(1)(B) states:

> the term "class action" means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action ....

28 U.S.C. § 1332(d)(1)(B).

[4] Section 1332(d)(5)(B) provides:

> Paragraphs (2) through (4) [28 U.S.C. §§ 1332(d)(2) - (4)] shall not apply to any class action in which *** the number of members of all proposed plaintiff classes in the aggregate is less than 100.

28 U.S.C. § 1332(d)(5)(B). *See Blockbuster*, 472 F.3d at 57 (the 100-person requirement is a "prerequisite[]" for CAFA jurisdiction).

1. The "Filing" Requirement is Not Met

It is undisputed that the action was not "filed under" Rule 23 or a state law counterpart.[5] It was filed as a derivative action.[6] Thus, it does not qualify as a class action under CAFA. *See Palm Harbor Homes, Inc. v. Walters*, No. 08-CV-196, 2009 WL 562854, *2 (M.D. Ala. Mar. 5, 2009) (no CAFA jurisdiction where case did not satisfy section 1332(d)(1)(B)'s "narrow definition," noting that plaintiff "did not invoke Federal Rule of Civil Procedure 23, or any similar State statute"); *Beverly Enters.*, 2005 U.S. Dist. LEXIS 38870, *5 (remanding case removed under CAFA: "Because the lawsuit was not filed under Rule 23 or a similar state statute as a class action, this Court has no jurisdiction."); *see generally Blockbuster*, 472 F.3d at 56 (explaining that section 1332(d)(1) "defines a class action as any civil action filed under Rule 23 of the Federal Rules of Civil Procedure or a similar state rule ...."); *compare with Mattera v. Clear Channel Commc'ns, Inc.*, 239 F.R.D. 70, 78 (S.D.N.Y. 2006) (action qualified as "class action" under CAFA where plaintiff filed suit "on her own behalf and on behalf of a class of persons under [Fed. R. Civ. P.] 23(a), (b)(2), and (b)(3).") (brackets in original).

2. The 100-Person Requirement is Not Met

FGA claims that, because there are more than 100 shareholders of Fairfield Sentry, the action is a class action on behalf of more than 100 people, thus satisfying CAFA's numerosity requirement. Notice of Removal, ¶ 6(f). The argument is circular and specious. This is a derivative action, not a class action; accordingly, the number of Fairfield Sentry's shareholders is irrelevant. Were the rule otherwise, virtually every derivative action on behalf of publicly-traded companies would be a "class action" removable under CAFA, thus flooding the federal courts with derivative actions routinely filed in state courts. Nothing in the statute or the caselaw contemplates this result.[7]

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[5] *See generally* N.Y. Civ. Prac. Law & Rules, Article 9 (Class Actions).

[6] FGA acknowledges that fact. *See* Notice of Removal, ¶ 1 (the case was brought as a "putative derivative action"). As the "master of the complaint," plaintiffs get to choose how to plead. *See, e.g., Caterpillar Inc. v. Williams*, 482 U.S. 386, 387 (1987); *see also Sung v. Wasserstein*, 415 F. Supp. 2d 393, 398 (S.D.N.Y. 2006) (Marrero, J.) ("[A] plaintiff, as master of her complaint, is free to avoid federal jurisdiction by pleading only state claims even where a federal claim is also available") (internal quotations and citation omitted). "Jurisdiction may not be sustained on a theory that the plaintiff has not advanced." *Merrell Dow Pharms. Inc. v. Thompson*, 478 U.S. 804, 810 n.6 (1986).

The number of shareholders, of course, *is* relevant to an action filed as a class action -- for purposes of assessing whether the number of class members satisfies CAFA's 100-person numerosity requirement. But nothing in CAFA permits a defendant to "magically convert this lawsuit into a class action" simply because the number of shareholders of the nominal defendant exceeds 100. *See Palm Harbor Homes*, 2009 WL 562854, *2 (refusing to treat declaratory action as a class action under CAFA, even though the action was "related to an arbitration between the parties wherein class allegations have been made").

C. This is Not a "Mass Action"

Under CAFA, if an action is not a "class action" under section 1332(d)(1)(B), it still may be "deemed" one if it is a "mass action" that otherwise satisfies the requirements of 28 U.S.C. §§ 1332(d)(2)-(10). *See* 28 U.S.C. § 1332(d)(11)(A). CAFA defines a "mass action" as

> any civil action ... in which *monetary relief claims of 100 or more persons are proposed to be tried jointly* on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [section 1332](a).

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[7] Had Congress wanted, it could have drafted the statute to permit removal of derivative cases filed on behalf of companies owned by 100 or more shareholders or beneficiaries. But "Congress included no such language in the text of the statute." *See Blockbuster*, 472 F.3d at 57 (addressing defendant's burden of proof under CAFA).

28 U.S.C. § 1332(d)(11)(B) (emphasis added).

But here, the claims are *derivative* claims on behalf of just one person -- the Fund. Thus, the action does not assert individual claims (monetary or otherwise) of 100 persons -- much less claims of 100 persons that are proposed to be tried jointly. *See generally Continental Cas. Co. v PricewaterhouseCoopers, LLP*, 869 N.Y.S.2d 506, 507, 57 A.D.3d 411 (1st Dep't 2008) ("Even if plaintiff limited partners' claims of fraudulent inducement are sufficient, as a legal matter, to support a direct claim against the partnership's auditor, ... they failed to submit evidence to raise an issue of fact in opposition to defendant's prima facie showing that the damages claimed all emanated from losses that took place after the initial investment, did not affect plaintiffs differently from other limited partners, *and were therefore derivative* ....") (emphasis added) (citations omitted); *Kramer v. Western Pac. Indus., Inc.*, 546 A.2d 348, 353 (Del. 1988) ("Delaware courts have long recognized that actions charging 'mismanagement which depress[] the value of stock [allege] a wrong to the corporation; *i.e.*, the stockholders collectively, to be enforced by a derivative action.'") (brackets in original, citations omitted); *cf. Sung v. Wasserstein*, 415 F. Supp. 2d 393, 408 (S.D.N.Y 2006) (Marrero, J.) (remanding derivative lawsuit that had been removed under Securities Litigation Uniform Standards Act ("SLUSA"), noting that the case was "not a class action").[8]

The absence of 100 claimants in the Complaint thus is fatal to any "mass action" jurisdiction. *See Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009) (affirming remand: CAFA's "mass action" provision did not permit removal of cases, each of which asserted claims

[8] SLUSA requires, *inter alia*, that the lawsuit (or group of lawsuits) seek damages "on behalf of more than 50 persons ...." *See* 15 U.S.C. § 77p(f)(2)(A). In *Sung*, the Court found that SLUSA's "conditions [had] not been satisfied" with respect to the derivative action. 415 F. Supp. 2d at 408, *see id.* at 407 ("None of these conditions are met here.").

of fewer than 100 plaintiffs); *compare with Galstaldi v. Sunvest Cmtys. USA, LLC*, 256 F.R.D. 673, 2009 U.S. Dist. LEXIS 16777, *6 (S.D. Fla. 2009) (action was "mass action" where, *inter alia*, "[t]he Complaint on its face names 177 individual Plaintiffs, thereby appearing to satisfy the numerosity requirement.").

Moreover, because the claims are derivative, no plaintiff -- much less 100 persons -- could satisfy the $75,000 jurisdictional amount required under 28 U.S.C. § 1332(a). Accordingly, there is no jurisdiction here.

D. CAFA's Exclusions Preclude Jurisdiction

Even assuming, *arguendo*, that this were a class action that otherwise satisfied CAFA's requirements, jurisdiction still would be unavailable because the claims implicate the internal affairs of the nominal defendant, Fairfield Sentry, and the duties that defendants owed it. CAFA excludes such claims from its reach. Specifically, CAFA provides that subject matter jurisdiction under section § 1332(d)(2) "shall not apply to any class action that solely involves a claim"

> that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized ....

28 U.S.C. § 1332(d)(9)(B).

In this case, the claims quintessentially relate to the "internal affairs or governance" of Fairfield Sentry arising under non-federal law, including defendants' mismanagement of the Fund's affairs and their failure to discharge fiduciary duties.[9] As such, even if this were a class action (it is not), there would be no jurisdiction under section 1332(d)(2)(B). As the Northern District of California court explained in finding that CAFA jurisdiction was unavailable under section 1332(d)(9)(B):

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[9] In *Blockbuster*, the Second Circuit raised, but did not resolve, the issue as to which party bears the burden of proof concerning CAFA's "exceptions" under 28 U.S.C. §§ 1332(d)(3) and (5). *See* 472 F.3d at 58. Plaintiffs submit that, as to 28 U.S.C. § 1332(d)(9)(B), defendants bear the

[footnote continued]

> [P]laintiff alleges defendants, in their role as general partners of the Textainer partnerships, (1) rendered the sale of the assets of the partnerships "fundamentally unfair" to the limited partners by demanding that all potential bidders agree to enter into a management contract with one of the defendants, (2) rendered the sale "fundamentally unfair" to the limited partners by undervaluing Textainer's assets, and (3) gained support for the sale by distributing materially misleading proxy statements to the limited partners. Each of these alleged acts affects plaintiff and the other limited partners solely in their capacity as limited partners of the Textainer partnerships. Indeed, plaintiff essentially claims that defendants "fraudulent[ly] or negligent[ly] mismanage[d]" the partnership's affairs, and "unlawfully profit[ed] at the [partnership's] expense." Moreover, the fiduciary duties allegedly breached arise solely because of the parties' relationship as partners of the Textainer partnerships.

In re Textainer P'ship Sec. Litig., No. 05-CV-0969, 2005 U.S. Dist. LEXIS 26711, *19-20 (N.D. Cal. July 27, 2005) (brackets in original, citations omitted).[10] Similarly, jurisdiction here is precluded by section 1332(d)(9)(B).

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burden of proof. The issue, however, is academic here because even if plaintiffs bear the burden, it has been satisfied.

[10] We also submit that, even if this were a class action under CAFA, jurisdiction also would be unavailable because of section 1332(d)(9)(C). That section provides that section 1332(d)(2) "shall not apply to any class action that solely involves a claim ... that relates to the rights, duties (including fiduciary duties), and obligations relating to or created by or pursuant to any security (as defined under section 2(a)(1) of the Securities Act of 1933 (15 U.S.C. 77b(a)(1)) and the regulations issued thereunder)." 28 U.S.C. § 1332(d)(9)(C). *See Textainer P'ship*, 2005 U.S. Dist. LEXIS 26711, at *24 (§ 1332(d)(9)(C) applied "[b]ecause the sole claim in the *Labow* action concerns, exclusively, 'fiduciary duties relating to or created by or pursuant to' the limited partnership interests in the Textainer partnerships, and those interests are securities"); *Estate of Pew v. Cardarelli*, 527 F.3d 25, 35-38 (2d Cir. 2008) (Poller, J., dissenting). We are aware that our position is contrary to the Panel's majority ruling in *Pew*, *see* 527 F.3d at 31-32, and respectfully submit that the majority erred. Nonetheless, we raise the issue now to preserve it for possible appellate review and rectification.

E. Plaintiffs Should be Awarded Costs

Under 28 U.S.C. §1447(c), the Court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." In evaluating such relief, the Court properly considers whether the removing party "lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Here, there was no reasonable basis for the removal. To the contrary, it was pure stratagem. Accordingly, plaintiffs should be awarded costs.

CONCLUSION

For the foregoing reasons, plaintiffs' motion should be granted.

Dated: New York, New York
June 8, 2009

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UNITED STATES DISTRICT COURT
SOURTHERN DISTRICT OF NEW YORK

ANWAR et al. , Plaintiffs, vs. FAIRFIELD GREENWICH GROUP et al. Defendants.	09 Civ. 0118 (VM)(THK)
FAIRFIELD SENTRY LIMITED, Plaintiff, vs. FAIRFIELD GREENWICH GROUP et al. Defendants.	09 Civ. 5650 (VM)(THK)

NOTICE OF MOTION TO REMAND THIS ACTION TO STATE COURT

PLEASE TAKE NOTICE that Fairfield Sentry Limited, consolidated plaintiff in No. 09 CV 5650 (VM) (the "Action"), by its undersigned counsel, upon the accompanying memorandum of law, the Affidavit of Jack Yoskowitz, sworn to July 10, 2009 and the exhibits attached thereto, and all prior papers had herein, hereby moves the Court for an Order:

(i) pursuant to 28 U.S.C. § 1447(c), remanding the Action to the Supreme Court of the State of New York, County of New York, and awarding plaintiff costs incurred as a result of the removal of the Action;

(ii) vacating the Court's Order dated June 25, 2009 (Dkt. No. 4, 09 CV 5650), which consolidated the Action with *Anwar v. Fairfield Greenwich Group*, 09 CV 0118 (VM); and

(iii) for such other and further relief as the Court may deem just and proper.

July 10, 2009

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UNITED STATES DISTRICT COURT
SOURTHERN DISTRICT OF NEW YORK

ANWAR et al., Plaintiffs, vs. FAIRFIELD GREENWICH GROUP et al. Defendants.	09 Civ. 0118 (VM)(THK)
FAIRFIELD SENTRY LIMITED, Plaintiff, vs. FAIRFIELD GREENWICH GROUP et al. Defendants.	09 Civ. 5650 (VM)(THK)

FAIRFIELD SENTRY LIMITED'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO REMAND TO STATE COURT AND TO VACATE THE CONSOLIDATION ORDER

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Transeastern Shipping Corp. v. India Supply Mission,
53 F.R.D. 204 (S.D.N.Y. 1971)…………………………..…………………………….9

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174 Cal. App. 4th 213; 94 Cal. Rptr. 3d 166 (Cal. Ct. App. 2009)…...………………………..…7

Webb v. Goord
197 F.R.D. 98 (S.D.N.Y. 2000)…………………………..…………………………..….9,10

STATUTES AND RULES

28 U.S.C. § 1332(c)……………………………………………….…………………..6, n.4

28 U.S.C. § 1332(d)(9)(b)……..…………………………………………….......................8

28 U.S.C. § 1332(d)(11)(B)(i)……………………..……………………..…………...1, 2, 6

28 U.S.C. §1447(c)……………………………………………………...…...….......1, 4, 8

15 U.S.C. § 78u-4(b)(3)(B)…………………………………………….…............…....11

Fed. R. Civ. P. 42(a)...........……………………………………………….……..........…....9

Plaintiff Fairfield Sentry Limited (the "Company") respectfully submits this memorandum of law in support of its motion to (1) remand this action back to state court under 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction, and (2) vacate the consolidation order, filed on June 25, 2009, Docket No. 177, under sections 2 and 7 of this Court's Consolidation Order and Order for Appointment, dated January 31, 2009, Docket No. 40 (hereinafter the "Standing Consolidation Order").[1]

PRELIMINARY STATEMENT

This is a straightforward case in which the Company seeks, among other things, the return of management and performance fees which it erroneously paid to its former investment and risk managers, Defendants Fairfield Greenwich Group, Fairfield International Managers, Inc., Fairfield Greenwich Limited, Fairfield Greenwich Advisors LLC and Fairfield Greenwich (Bermuda) Ltd. (the "Fairfield Entity Defendants"), based on inflated net asset value reports derived from the Company's investments with Bernard L. Madoff Investment Securities LLC ("BLMIS").[2] Fairfield Greenwich Advisors LLC's ("FGA") sole basis for removal is that this case involves a "mass action" under the Class Action Fairness Act of 2005 ("CAFA"). *See* Notice of Removal, dated June 19, 2009, ("NoR") ¶ 4. As detailed below, because CAFA is inapplicable, this Court lacks subject matter jurisdiction.

Contrary to FGA's contention, this case is not a "mass action" under 28 U.S.C § 1332(d)(11)(B)(i)("mass action" means any civil action "in which monetary relief claims of 100 or more persons are proposed to be tried jointly ...")(emphasis added). The Company is the only plaintiff in this case and it has asserted *direct* state law claims against the Fairfield Defendants for (1) breach of the investment management agreements between the Company and certain of the Fairfield Entity Defendants, (2) breach of the fiduciary duties and duties of care owed to the Company, and (3) equity arising from the Fairfield Entity Defendants' disbursement of management and performance fees to their partners and principals. There is no dispute that the Company -- and only the Company -- has privity and standing to assert these direct claims.

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[1] Unless otherwise noted, references to Docket No. are to *Anwar v. Fairfield Greenwich Group et al.*, 09-cv-0118 (hereinafter "*Anwar*").

[2] Defendants also include certain partners and principals of the Fairfield Entity Defendants, who received a portion of the management and performance fees (Defendants will be collectively referred to herein as the "Fairfield Defendants").

FGA's representation that the Company brought these claims on behalf of its shareholders is misleading and contradicted by the plain allegations of the Company's Verified Complaint.[3] NoR ¶ 6(f). This is not a derivative action brought by shareholders on behalf of the Company. Further, FGA's contention that CAFA's 100-Person requirement can be met simply because the Company has more than 100 shareholders and recoveries will be passed on to them (NoR ¶ 6(f)) is baseless. The number of individuals holding shares in the Company is irrelevant because none of them are plaintiffs in this action. FGA's tortured interpretation of a "mass action" ignores the plain language of 28 U.S.C. § 1332 (d)(11)(B)(i), invalidates a bedrock principle of corporate law that a corporation is a separate and distinct entity, and urges the Court to engage in an extraordinary expansion of the subject matter jurisdiction of the federal courts not envisioned by Congress. Under FGA's view, literally any company, public or private, with more than 100 shareholders could be deprived of its chosen forum and haled into federal court. That is not the intent of CAFA.

To the extent the Court finds that CAFA provides the Court subject matter jurisdiction over this action, deconsolidation with *Anwar* is appropriate because the Company has asserted separate and distinct claims from those asserted by the *Anwar* class action plaintiffs – who do not, and cannot, assert derivative claims on behalf of the Company. Therefore, Co-

[3] A copy of the Verified Complaint is attached as Ex. A to the NoR.

Interim Lead Counsel for the class is not competent to represent the interests of the Company as contemplated by sections 12, 14 and 15 of the Standing Consolidation Order. Further, under the current case management order and the Fed. R. Civ. P. 26(f) discovery plan filed by certain parties in *Anwar*, the Company's action may be paralyzed as the Fairfield Defendants have taken the extreme positions that no individual consolidated pleading needs to be answered, and no discovery should be taken until the Court resolves issues relating to the filing of a future Second Amended Consolidated Complaint and the resolution of a discovery stay under the Private Securities Litigation Reform Act ("PSLRA"). Such delay would be prejudicial to the Company.

STATEMENT OF THE CASE

The Company is a company duly incorporated under the International Business Companies Act of the British Virgin Islands, and its principal place of business is in the British Virgin Islands. *Verified Complaint* filed May 29, 2009 ("*Compl.*"), ¶ 12. Beginning from November 1990 through May 2009, certain of the Fairfield Entity Defendants were retained as the Company's investment and risk adviser in connection with the Company's investments with Bernard L. Madoff Investment Securities LLC ("BLMIS"). *Compl.* ¶ 3. In connection therewith, the Fairfield Entity Defendants oversaw the day-to-day investment operations of the company. *Id.* In consideration for their services, the Fairfield Entity Defendants received: (a) starting in May 2004, a fixed monthly management fee in an amount equal to 1%, per annum, of the Company's net asset value, and (b) from inception, a quarterly performance fee in an amount equal to 20% of the net appreciation of the Company's net asset value. *Id.* ¶ 4. Partners and/or controlling persons of the Fairfield Entity Defendants received a portion of the management and performance fees. *Id.* ¶¶ 19-37.

The Company's net asset value was recorded on net asset value reports (the "Net Asset Value Reports"), which were prepared under the supervision of the Fairfield Entity

Defendants based on the account statements and information that BLMIS provided to the Fairfield Entity Defendants. *Compl.* ¶ 5. On March 12, 2009, Bernard Madoff admitted that he began his fraud in the 1990s and pled guilty to 11 counts of securities fraud. *Id.* ¶ 8.

Madoff's admissions contradicted the Net Asset Value Reports. Accordingly, from the outset of its relationship with Defendants, the Company paid, and Defendants received, hundreds of millions of dollars in management and performance fees based on inflated information. *Id.* ¶ 10. The Company is entitled to recover these fees.

Procedural History

The Company's Verified Complaint was filed in the New York Supreme Court, County of New York on May 29, 2009, and it was removed by FGA to this Court on June 19, 2009. By Order dated June 25, 2009 (Docket No. 177), this action was consolidated with *Anwar* under the Standing Consolidation Order and the Civil Case Management Plan and Scheduling Order issued by this court on March 11, 2009 (Docket. No. 69) (the "CMO"). Thus, this motion is timely under Section 7 of the Standing Consolidation Order and 28 U.S.C. § 1447(c). Affidavit of Jack Yoskowitz, sworn to July 10, 2009 ("Yoskowitz Aff.") ¶¶ 2-3.

ARGUMENT

I.

THE COURT SHOULD REMAND THE ACTION FOR LACK OF SUBJECT MATTER JURISDICTION

A. FGA Bears the Burden of Proof

FGA bears the burden of establishing subject matter jurisdiction under CAFA. *Blockbuster, Inc. v. Galeno*, 472 F.3d 53, 58 (2d Cir. 2006) ("we hold that CAFA did not change the traditional rule and that defendant bears the burden of establishing federal subject matter jurisdiction"); *Anwar v. Fairfield Greenwich Ltd.*, 09 Civ 118 (VM)(THK), 2009 U.S. Dist.

LEXIS 37077, *12 (S.D.N.Y. May 1, 2009). Moreover, "when the removal of an action to federal court is contested, 'the burden falls squarely upon the removing party to establish its right to a federal forum by 'competent proof.'" *Federal Ins. Co. v. Tyco Int'l. Ltd.*, 422 F. Supp. 2d 357, 368 (S.D.N.Y. 2006)(internal citation omitted).

Federal courts construe the removal narrowly and there is a strong presumption against removal. *Lupo v. Human Affairs Int'l., Inc.*, 28 F. 3d 269, 274 n.16 (2d Cir. 1994) ("In light of the congressional intent to restrict federal jurisdiction, as well as the importance of preserving the independence of state governments, federal courts construe the removal statute narrowly, resolving any doubts against removability."); *Chiropractic Neurodiagnostic, P.C. v. Allstate Ins. Co.*, No. 08-CV-23 19, 2009 U.S. Dist. LEXIS 5822, *7-8 (E.D.N.Y. Jan. 26, 2009) (remanding case removed under CAFA, explaining that "any doubts" must be "resolved against removability 'out of respect for the limited jurisdiction of the federal courts and the rights of states.'") (quoting *In re Methyl Tertiary Butyl Ether ("MTBE") Prods.*, 488 F.3d 112, 124 (2d Cir. 2007)). *See also Segal v. Varonis Systems, Inc.*, 601 F. Supp. 2d 551, 552-53 (S.D.N.Y. 2009) ("A plaintiff is the 'master of the complaint' and may preclude removal by electing to disregard available federal dimension of a claim and asserting only a distinct state law cause of action"). FGA cannot meet its burden.

B. This is Not a "Mass Action"

FGA concedes, as it must, that this is not a "class action." NoR ¶ 4. Instead, FGA argues that this case is a "mass action" given that the Company has more than 700 shareholders, notwithstanding the undisputed fact that not one of them is a plaintiff in this case. NoR ¶ 4, 6(f). See also Ex. B to NoR. CAFA defines a "mass action" as

> any civil action ... in which *monetary relief claims of 100 or more persons are proposed to be tried jointly* on the ground that the plaintiffs' claims involve common questions of law or fact, except

> that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [section 1332](a).

28 U.S.C. § 1332(d)(11)(B)(i) (emphasis added).

From the face of the Verified Complaint it is clear that there is only *one* plaintiff, and the Company asserts claims on its own behalf. Contrary to FGA's representation (NoR ¶ 6(f)), the Company does not assert individual claims on behalf of 100 or more persons -- much less claims of 100 persons that are proposed to be tried jointly. The absence of 100 claimants in the Verified Complaint is fatal to any "mass action" jurisdiction under CAFA. *Tanoh v. Dow Chem. Co.*, 561 F.3d 945, 953 (9th Cir. 2009) (affirming remand because CAFA's "mass action" provision did not permit removal of various cases, each of which asserted claims of fewer than 100 plaintiffs). *Palm Harbor Homes, Inc. v. Walters*, No. 08-196, 2009 U.S. Dist. LEXIS 17740, *4 (M.D. Ala. Mar. 5 2009) (declining to extend jurisdiction under CAFA where, as here, the action was filed by a single corporate plaintiff).

Further, to find that the 100-person requirement is met merely because a private or public corporation has more than 100 shareholders would ignore well-settled corporate law that the corporation is a distinct legal entity separate from its shareholders.[4] It is "the accepted principle that a corporation exists independently of its owners, as a separate legal entity, that the owners are normally not liable for the debts of the corporation, and that it is perfectly legal to incorporate for the express purpose of limiting the liability of corporate owners." *In re Morris*, 82 N.Y.2d 135, 140 (1993). Corporate separateness is the principle "[a]round [which] the entire body of corporation law is built. It is accepted in theory and practice and ingrained in our legal and economic systems. Courts will not lightly disregard the corporate entity." *Lowendahl v.*

[4] By way of analogy, for diversity purposes, a corporation is deemed to be a citizen of the State where it was incorporated or the State where it has its principal place of business. 28 U.S.C. § 1332(c). The citizenship of its non-party individual shareholders is irrelevant.

Balt. And Ohio R.R. Co., 247 A.D. 144, 154 (1st Dep't 1936). We are not aware of, and FGA has not cited to, any authority permitting the piercing of the corporate veil to count the number of *non-party* shareholders of a company to satisfy CAFA's 100-person requirement. The corporate form should be respected here.

It is also well-established that shareholders have no standing to assert individual claims predicated on mismanagement resulting in the diminution of value of their shares. Those claims belong to the corporation. *Gordon v. Elliman*, 206 N.Y. 456, 466 (1953); *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985); *Primavera Familienstiftung v. Askin*, 1996 U.S. Dist. LEXIS 12683, *42 (S.D.N.Y. 1996) ("Claims based on corporate mismanagement or third-party action that resulted in diminution of share value belong to the corporation and can only be brought by it."). Therefore, not one of the Company's shareholders has standing to assert the direct claims that the Company has asserted in the Verified Complaint.

Moreover, because the Company has taken action to recover its losses, no shareholder of the Company has standing to bring a derivative lawsuit here on behalf of the Company under British Virgin Islands law. Under the well-settled "internal affairs" doctrine, *Hart v. General Motors Corp.*, 129 A.D.2d 179, 183 (1st Dep't 1987), *Scottish Air Int'l. v. British Caledonia Group, PLC*, 81 F.2d 1224, 1234 (2d Cir. 1996), a BVI company shareholder's right to commence a derivative action is governed by British Virgin Islands law. *See e.g. Vaughn v. LJ International, Inc.*, 174 Cal. App. 4th 213 (Cal. Ct. App. 2009) (observing that the BVI Business Companies Act is the statute that specifically addresses shareholder derivative actions, and noting that Section 184C of the Act restricts derivative actions where, as here, the company has commenced proceedings to enforce its rights). No shareholder of the

Company has obtained the proper leave from a British Virgin Islands court to assert such claims.[5]

In sum, because the Company is the proper and sole plaintiff in this action, the Company's action is not a "mass action" under CAFA.

C. CAFA's Exclusions Also Preclude Jurisdiction

Remand is also proper because the Company's claims implicate its internal affairs and the duties that the Fairfield Defendants owed to the Company. CAFA provides that subject matter jurisdiction under section § 1332(d)(2) shall not apply to any class action that solely involves a claim:

> that relates to the internal affairs or governance of a corporation or other form of business enterprise and that arises under or by virtue of the laws of the State in which such corporation or business enterprise is incorporated or organized ....

28 U.S.C. § 1332(d)(9)(B).

Here, jurisdiction is precluded by 28 U.S.C. § 1332(d)(9)(B). The Company seeks to recover damages from, and the return of management and performance fees paid to, the Fairfield Defendants who were responsible for the day-to-day operations and management of the Company's investments with BLMIS.

D. The Company Should be Awarded Costs

Under 28 U.S.C. § 1447(c), the Court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." In evaluating such relief, the Court properly considers whether the removing party "lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). Here, there was no reasonable basis for the removal given that this action is clearly not a "class action" nor a "mass action" as those terms are defined by CAFA.

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[5] In fact, that precise issue is presently before the New York State Supreme Court. On May 15, 2009, Morning Mist Holdings Ltd. and Miguel Lomeli (the "*Morning Mist*" Plaintiffs), purported shareholders of the Company, filed a proposed derivative shareholder lawsuit on behalf of the Company. Simultaneous with that complaint, the *Morning Mist* Plaintiffs filed under a separate index number a petition seeking leave to pursue a derivative action on behalf of the Company in accordance with the laws of the British Virgin Islands. *Morning Mist Holdings Ltd. and Miguel Lomeli v. Fairfield Sentry Ltd.*, Index No. 601527/09 (Sup. Ct. N.Y. County). On July 2, 2009, the Company filed opposition papers and answered the petition.

II

THE COURT SHOULD VACATE THE ORDER OF CONSOLIDATION

The consolidation order should be vacated for two principal reasons: (a) as detailed above, the Court lacks subject matter jurisdiction, and (b) consolidation with the massive putative *Anwar* class action will cause delay, in effect merge the Company's claims with the class action plaintiffs in violation of the "no merger" rule, and prejudice the Company.

A. Standard for Consolidation

Federal Rule of Civil Procedure 42(a) empowers the Court to consolidate actions when there are common questions of law or fact to avoid unnecessary costs or delay. *Johnson v. Celotex Corp*., 899 F.2d 1281, 1284 (2d Cir. 1990). The burden is on FGA -- as the proponent for consolidation -- to demonstrate that consolidation is appropriate by showing the commonality of factual and legal issues in different actions. *Webb v. Goord*, 197 F.R.D. 98, 101 (citing *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 374 (2d Cir. 1993)); *In re Currency Conversion Fee Antitrust Litig*., 2009 U.S. Dist. LEXIS 53265, *6 (S.D.N.Y., June 18, 2009)(citing *Transeastern Shipping Corp. v. India Supply Mission*, 53 F.R.D. 204, 206 (S.D.N.Y. 1971)).

The "district court must examine 'the special underlying facts' with 'close attention' before ordering a consolidation." *In re Repetitive Stress Injury Litig*., 11 F.3d at 374 (quoting *Katz v. Realty Equities Corp.*, 521 F.2d 1354, 1361 (2d Cir. 1975)). Moreover, the only purpose of consolidating actions is to promote judicial economy, specifically to "expedite trial and eliminate unnecessary repetition and confusion." *Devlin v. Transportation Commc'ns Int'l*

Union, 175 F.3d 121, 130 (2d Cir. 1999). Judicial economy, however, must be balanced against considerations of equity and "efficiency cannot be permitted to prevail at the expense of justice." *Devlin*, 175 F.3d at 130. Where the benefits of consolidation are outweighed by prejudice to a party, actions should not be consolidated. *Garber v. Randell*, 477 F.2d 711, 714 (2d Cir. 1973); *Webb*, 197 F.R.D. at 10.

A close look at the underlying facts and the case management orders of *Anwar* warrants that this action be deconsolidated from the *Anwar* class action.

B. Consolidation Would Strip the Company's Right to Prosecute Its Separate and Distinct Claims Against the Fairfield Defendants

It is undisputed that the Company has standing to prosecute its direct claims against the Fairfield Defendants. *See supra* at p. 7. However, the terms of the controlling case management orders in *Anwar* would in effect eliminate the Company's right to prosecute its claims in violation of the "no merger" rule. *Johnson v. Manhattan Railway Co.*, 289 U.S. 479, 496-97 (consolidation does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another).

The Standing Consolidation Order appointed counsel for the *Anwar* class action plaintiffs as Interim Co-Lead Counsel to "act on behalf of all Plaintiffs in the consolidated cases." (Standing Consolidation Order ¶ 12).[6] It also provides that Interim Co-Lead Counsel "shall have sole authority" over briefing of motions, pretrial activities and plan for trial, settlement negotiations, and matters concerning the prosecution and/or resolution of the consolidated actions. *Id.* ¶ 14. On April 24, 2009, the Consolidated Amended Complaint was filed (Docket.

[6] The Company notes that the CMO and the Standing Consolidation Order are a product of negotiations between counsel for the *Anwar* class action plaintiffs and counsel for certain of the defendants, which occurred before the Company was consolidated in *Anwar* as a plaintiff.

No. 116) asserting direct claims of shareholders against entities and individuals related to Fairfield Greenwich Group, and entities related to Citco Fund Services (Europe) B.V.

The Consolidated Amended Complaint does not, and cannot, purport to assert derivative claims on behalf of the Company.[7] Nor do the *Anwar* class action plaintiffs, or any other shareholder of the Company for that matter, have standing to pursue a derivative action on behalf of the Company under British Virgin Islands law. *See, supra*, p. 7.

Therefore, the Company has asserted direct claims against the Fairfield Defendants, which are separate and distinct from the claims asserted by the class action plaintiffs. To be sure, no purported shareholder of the Company (nor its counsel) is competent to act on behalf of the Company in the consolidated actions.

C. Consolidation Would Unduly Delay the Prosecution of the Company's Direct Claims

On May 29, 2009, a Joint Rule 26(f) Discovery Plan was filed, which stated that Interim Co-Lead Plaintiff would seek leave to file a Second Consolidated Amended Complaint to include claims under the federal securities law claims under the PLSRA, which imposes a stay of discovery while a motion to dismiss is pending. Specifically, the statute states, "in any private action arising under [federal securities law], all discovery and other proceedings shall be stayed during the pendency of any motion to dismiss, unless the court finds upon the motion of any party that particularized discovery is necessary to preserve evidence or to prevent undue prejudice to that party." 15 U.S.C. § 78u-4(b)(3)(B). By Order dated July 7, 2009 (Docket. No.

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7 By notice of removal dated May 28, 2009, FGA removed a proposed shareholder derivative action on behalf of the Company to this Court. *Morning Mist Holdings, Ltd. v. Fairfield Greenwich Group, et al.*, 09 Civ 5012, Docket No. 1. On June 8, 2009, the Morning Mist Plaintiffs moved to remand this action to state court. *Id.* Docket No. 9. On June 9, 2009, the proposed shareholder derivative action was consolidated with *Anwar*. *Id.* Docket No. 11. On June 24, 2009, the *Morning Mist* Plaintiffs moved to vacate the consolidation order and to appoint their counsel as Co-Lead Derivative Counsel in *Anwar*. *Id.*, Docket No. 13. The Company objects to any appointment of Co-Lead Derivative Counsel as premature given that the issue is pending before the New York State Supreme Court.

178) the Court appointed counsel for the *Anwar* plaintiffs as lead plaintiffs given that they plan to file a second amended consolidated complaint to include PSLRA claims and to "vigorously" pursue those claims. See also Stipulation Adjourning Deadline to Respond to the Complaint, dated June 9, 2009 (Docket No. 168).

Further, under the CMO, the Fairfield Defendants apparently are only obliged to respond or answer to the Amended Consolidated Complaint, and not to any individual complaints. CMO Section 6 states "Defendants shall respond *only* to the Consolidated Amended Complaint; no response is due to any *individual complaints that are consolidated* into the Consolidated Action." (emphasis added). Thus, the Company will be further prejudiced by consolidation because the Fairfield Defendants have taken the position that they have no obligation to answer individual complaints under the CMO. *See* Yoskowitz Aff. Ex. A (Mark Cunha's June 9, 2009 letter to the Court).

In addition, the Discovery Plan contemplates a stay of discovery pending the resolution of issues relating to the PSLRA stay. While the PSLRA stay should not apply to the Company's action as it involves state law claims and does not implicate state or federal securities law claims, it appears that the Fairfield Defendants would nonetheless seek to stay discovery under the Discovery Plan, and further delay the prosecution of the Company's claims.

CONCLUSION

For the foregoing reasons, the Company's motion should be granted and costs should be awarded to the Company.

New York, New York
July 10, 2009

SEWARD & KISSEL LLP

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UNITED STATES DISTRICT COURT
SOURTHERN DISTRICT OF NEW YORK

ANWAR et al. , Plaintiffs, vs. FAIRFIELD GREENWICH GROUP et al. Defendants.	09 Civ. 0118 (VM)(THK) AFFIDAVIT OF JACK YOSKOWITZ
FAIRFIELD SENTRY LIMITED, Plaintiff, vs. FAIRFIELD GREENWICH GROUP et al. Defendants.	09 Civ. 5650 (VM)(THK)

State of New York)
) ss.
County of New York)

JACK YOSKOWITZ, being duly sworn, deposes and says:

1. I am a member of Seward & Kissel LLP, counsel for Plaintiff Fairfield Sentry Limited ("Sentry"). I am familiar with the facts set forth herein. I submit this affidavit in support of Plaintiff's motion to (1) remand this action to state court under 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction, and (2) vacate the consolidation order, filed on June 25, 2009 under sections 2 and 7 of this Court's Consolidation Order and Order for Appointment, dated January 31, 2009, 09 Civ. 0118, Dkt. No. 40.

2. The Company's Verified Complaint was filed in the New York Supreme Court, County of New York on May 29, 2009, and it was removed by FGA to this Court on June 19, 2009.

3. By Order dated June 25, 2009 (Dkt. No. 177), this action was consolidated with *Anwar* under the Standing Consolidation Order and the Civil Case Management Plan and Scheduling Order issued by this court on March 11, 2009 (the "CMO")(Dkt. No. 69).

4. Attached hereto as Exhibit A is a true and correct copy of a June 9, 2009 letter from Mark G. Cunha to the Court.

s/Jack Yoskowitz
Jack Yoskowitz

Signed before me this
10th day of July 2009

s/Ira J. Aronson
Notary Public

Ira J. Aronson
Notary Public, State of New York
No. 01AR4732833
Qualified in New York County
Commission Expires September 10, 2010

Exhibit A

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BY HAND

June 9, 2009

Re: *Anwar et al. v. Fairfield Greenwich Limited, et al.*, Docket No. 09 CV 0118 (VM)

Hon. Victor Marrero
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl St.
New York, NY 10007-1312

Dear Judge Marrero:

We represent defendant Fairfield Greenwich Advisors LLC ("FGA") and other defendants in *Anwar et al. v. Fairfield Greenwich Limited, et al.*, Docket No. 09 CV 0118 ("*Anwar*"). We write in response to the letter to the Court of earlier today from Robert Wallner, counsel for plaintiffs in *David I. Ferber SEP IRA* v. *Fairfield Greenwich Group, et al.*, Docket No. 09 CV 2366 ("*Ferber*"), *Pierce et al.* v. *Fairfield Greenwich Group, et al.*, Docket No. 09 CV 2588 ("*Pierce*"), and *Morning Mist Holdings Ltd. et al. v. Fairfield Greenwich Group et al.*, Docket No. 09 CV 5012 ("*Morning Mist*"), which the Court consolidated into *Anwar* on March 24, 2009, March 31, 2009, and June 9, 2009,[1] respectively (collectively, the "Consolidated Derivative Cases").

On June 8, 2009, the Court-appointed Interim Co-Lead Counsel and counsel for defendants in *Anwar* submitted to the Court a stipulation pursuant to which defendants consented to the service and filing by plaintiffs of a Second Consolidated Amended Complaint and agreed that defendants' time to answer, move against or otherwise respond to any complaint in *Anwar* would be adjourned until 45 days after service by plaintiffs of a Second Consolidated Amended Complaint (the "Stipulation"). For the Court's convenience, a copy of the Stipulation is attached hereto.

Mr. Wallner opposes the Stipulation to the extent it applies to "any complaint" in *Anwar*, including the complaints filed in the Consolidated Derivative Cases. Mr. Wallner's position is contrary to the clear terms of the Court's January 30, 2009 Consolidation Order

1 Mr. Wallner's letter was submitted prior to the Court's order consolidating *Morning Mist*.

and Order for Appointment of Interim Co-Lead Counsel (the "Consolidation Order") and the Court's March 11, 2009 Civil Case Management Plan and Scheduling Order in (the "CMO").

First, Mr. Wallner's objection ignores the unambiguous terms of the *Anwar* CMO, which provides that "Defendants shall respond only to the Consolidated Amended Complaint; no response by Defendants is due to any individual complaints that are consolidated into the Consolidated Action." CMO ¶ 6. No response to the complaints in the Consolidated Derivative Cases is required, and Mr. Wallner's opposition to the Stipulation to the extent it applies to those complaints is misguided.

Second, Mr. Wallner's assertion that the Stipulation is objectionable because the Consolidated Amended Complaint in *Anwar* does not assert derivative claims is unfounded. Pursuant to the Consolidation Order, the Court designated "Lovell Stewart Halebian LLP, Wolf Popper LLP and Boies, Schiller & Flexner LLP as Interim Co-Lead Counsel to act on behalf of *all Plaintiffs* in the consolidated cases. . ." Consolidation Order at 5, ¶ 12 (emphasis added); *see also* Consolidation Order at 5, ¶¶ 14-15. Interim Co-Lead Counsel has clear authority to act on behalf of plaintiffs in the Consolidated Derivative Cases and determine what claims to pursue on behalf of all plaintiffs in *Anwar*. Indeed, the Court designated Interim Co-Lead Counsel in order to organize plaintiffs' counsel and avoid precisely the type of divisiveness and confusion reflected in Mr. Wallner's letter. Moreover, while the Consolidated Amended Complaint does not assert derivative claims, Interim Co-Lead Counsel has advised us that they are considering asserting such claims in the Second Consolidated Amended Complaint.

For the foregoing reasons, we believe that Mr. Wallner's opposition to the Stipulation is without merit and we respectfully maintain our request that the Court so-order the Stipulation.

Respectfully submitted,

Mark G. Cunha (SMA)

Mark G. Cunha

cc: United States Magistrate Judge Theodore H. Katz (by hand)
All Counsel in *Anwar* (by email)